CONSIDERATIONS ON THE STATE CORPORATION IN FEDERAL AND INTERSTATE RELATIONS.

THE NORTHERN SECURITIES CASES.

1. The several suits brought against the Northern Securities Company of New Jersey and other parties by the United States, by the State of Washington and by the State of Minnesota are of notable interest. All the suits if pressed, will be finally adjudicated by the Supreme Court of the United States, which takes original jurisdiction of the Washington case, and will hear the others on appeal.

The transaction involved in these cases was also the subject of stockholders' actions, but these have been abandoned, leaving only the public suits; and as the company is attacked from three sides by three sovereigns we may expect a comprehensive definition of the Federal and interstate relations of a State corporation in some of their most important phases.

These suits are the matter of this article, which espouses the defendant's cause, but the fate of the Securities Company is so unimportant in comparsion with the general principles I discuss that I have ventured a broader title than a strict estimation of the text might justify.

THE UNITED STATES SUIT.

2. The petition of the United States against the Northern Securities Company of New Jersey, the Great Northern Railway Company of Minnesota, the Northern Pacific Railway Company of Wisconsin, and James J. Hill and other persons, contains the following charges:

"A virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems has been effected, a combination or conspiracy in restraint of the trade or commerce among the several States and with foreign nations formerly carried on by the defendant railway companies independently and in free competition one with the other has been formed and is in operation, and the defendants are thereby attempting to monopolize and have monopolized, such interstate and for-

eign trade or commerce to the great and irreparable damage of the people of the United States, in derogation of their common rights, and in violation of the act of Congress, of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The Governing Law.

3. In charging the defendants with violating the "common rights" of the people of the United States, the Government may seem to appeal to broad principles of law antedating the act of Congress presently cited—principles deemed sufficient in themselves to support the suit.

These "common rights" cannot be common law rights, for while most States have inherited or adopted the common law the United States have inherited none of it, and have adopted only such portions as are reproduced in their written law.[1]

This statement covers the written as well as the unwritten law of England, of the American colonies, and of the American States prior to the adoption of the Constitution; it emphasizes the institution of our Congress as a legislature with no inherited enactments, continuing in force until changed, with no law whatever behind it save the Constitution which created it; it marks the incapacity of our Department of Justice to institute suits, for the dissolution of a monopoly or a contract in restraint of trade for example, without authority derived from new law of the United States promulgated by Congress. Yet the old law is honored, as it is frequently consulted for interpreting the new.

4. The common rights in question can mean only constitutional rights which, in this relation, are such particular rights in respect of interstate intercourse as are so clearly defined in the Constitution itself that the Government may enforce them by suit without the special authority of an act of Congress.

There is at least one such right: The people are entitled to peaceful passage among the States both for themselves and their property. This right was upheld by the Supreme Court in the Debs case:

"The scope and purpose of the bill," said the Court, "was only to restrain the forcible obstruction of the highways along which interstate commerce travels and the mails are carried," and the Court held that in the exercise

[1] See Smith *v.* Alabama (1887) 124 U. S. 465.

of its enumerated powers the nation is competent "to remove all obstruction, natural or artificial, to the passage of interstate commerce or the carrying of the mail."[1] When the Court took the position in the Debs case that in an emergency warranting the employment of the Federal army at the President's instance the effective process of the Federal courts must be conspicuously appropriate, it emphasized the insurrectionary character of the acts which it proceeded to enjoin without citing any particular statute in justification of its course. The Court referred to the Act of 1890 only to disclaim reliance upon its provisions.

The facts in the case at bar do not disclose either an actual, or a constructive obstruction of the constitutional right of passage. And it is not worth while to speculate whether the power asserted in the Debs case could be properly exerted to dissolve a contract in restraint of commerce, or a monopoly of commerce, on the ground that the general right of passage includes a particular right to transportation by common carriers at reasonable rates.

The charge of violating "common rights" must be dismissed as a rhetorical flourish introducing the Act of July 2, 1890. Upon this statute the Government must rely exclusively.[2]

[1] (1894) 158 U. S., 598–9.

[2] The Supreme Court has condemned under the Act two associations formed by railroad companies for the purpose of regulating interstate traffic and rates (U. S. *v.* Freight Association (1897), 166 U. S., 290; U. S. *v.* Joint Traffic Association (1898), 171 U. S., 505); and a combination formed by pipe manufacturers for the purpose of directly regulating the interstate transportation and sale of their products (U. S. *v.* Addyston Pipe Co. (1899), 175 U. S., 211).

The Court has held that the Act is not directed against monopoly by patent, and so does not forbid a patentee from stipulating that the licensee shall sell articles throughout the United States at a fixed price (Bement *v.* National Harrow Co. (1902), 186 U. S., 70); that it does not deprive a State court of jurisdiction of a murder committed by wrecking a train carrying the mails (Crossley *v.* California (1898), 168 U. S., 641); and the Court has declined to enforce the Act collaterally where a mortgagor tried to repudiate a mortgage on the ground that its execution was part of a scheme to form an unlawful combination (Dikerman *v.* Northern Trust Co. (1900), 176 U. S., 195); and where a purchaser sought to repudiate a contract of sale on the ground that the vendor was a "trust" (Connolly *v.* Union Pipe Co. (1902), 184 U. S., 40.)

In considering this Act in relation to the case at bar, we shall inquire whether there is a transaction affecting commerce within the meaning of the Act? If so, whether there is a contract, combination or conspiracy in restraint of trade within the meaning of the Act? If not, whether there is a monopoly forbidden by the Act?

The Relation of the Defendants to Commerce.

5. Three suits brought under the Act have been dismissed by the Supreme Court, because the transactions in question were not sufficiently related to interstate commerce. These transactions were: The production in a State of a commodity distributed throughout the country;[1] the maintenance of a live stock exchange, whose members, for a commission, received, fed and forwarded cattle from other States, and submitted to various self-imposed restrictions upon the conduct of business;[2] the maintenance of a live stock exchange differing from the above chiefly in the fact that members bought cattle on their own account.[3]

The common principle of the above decisions seems to be that a business ramifying through several States is not necessarily interstate commerce within the meaning of the Act. "The Act of Congress," said the Court in another case, "must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have directly or remotely some bearing upon interstate commerce, and possibly to restrain it."[4]

6. Coming to the relation of the defendants in the case at bar to interstate commerce, we find that the Great Northern, and Northern Pacific Railway Companies are directly engaged in it, but they do not figure as participants in the alleged violations of law. True their joint purchase of the Chicago, Burlington and Quincy Railway, in 1901, is alleged to have been a preliminary step to the organization of the Securities Company, but no decree is prayed in respect of that transaction. The Court is simply requested to forbid these corporations to recognize the Securities Company as a stockholder—a matter of secondary importance, for if the

[1] U. S. *v.* E. C. Knight Co., (1894) 156 U. S., 1.
[2] Hopkins *v.* U. S., (1898) 171 U. S., 578.
[3] Anderson *v.* U. S., (1898) 171 U. S., 604.
[4] U. S. *v.* Joint Traffic Association, (1898) 171 U. S., 568.

main decree prayed for be granted the Company will be compelled to surrender its stock, whereupon it will cease to be a stockholder.

The railways are passive parties. Their relation to the transaction in question is purely subjective. The fact that they are engaged in interstate commerce is of importance only because shares of their stock have been acquired by the company.

7. The individual defendants were stockholders in the Great Northern, and Northern Pacific Railways, but they have disposed of their holdings to the Company, receiving its shares in payment. It does not seem necessary to inquire whether a shareholder in a company which owns stock in interstate railways is himself engaged in interstate commerce, because we meet the more searching question whether one actually holding stock in an interstate railroad, in this case the Company, is engaged in this commerce.

Evidently the relation of the Company to interstate commerce is more remote than that of the traffic associations that have been condemned by the Supreme Court, for these actually determined rates and prices, and apportioned business. On the other hand, its relation seems to be closer than that of the associations which have escaped condemnation. In describing the Traders' Live Stock Exchange the Court said, "It was not formed for pecuniary profits * * * as the Association itself does no business it can and does monopolize none."[1] This description does not altogether fit the Securities Company, which is formed for profit, and hence is engaged in business. When we consider the origin of this Company, and its purposes as disclosed by its works, a curt defence that it has no relation to interstate commerce would prove inadequate. The defendants must be prepared to demonstrate that the relation is not an unlawful one.

The Charge of Conspiracy or Combination in Restraint of Trade.

8. Mr. James J. Hill and other persons are made defendants on the ground that they have violated the first section of the Act, which begins as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal.

[1] Anderson *v.* U. S. (1898) 171 U. S., 617, 619.

What have they done? They have disposed of stock in the Great Northern, and Northern Pacific Railways to the Securities Company, which they formed for the purpose of acquiring stock in these lines, and they have received Company shares in payment.

The Government charges that this transaction was not conceived in good faith, but is a device for placing stock in the hands of a "mere depositary," receiving therefor "beneficial certificates." The charge is not substantiated. The transaction in the cases at bar is not like those condemned in the leading case of New York *v.* North River Sugar Refining Co.,[1] and in Lehigh Co. *v.* Kelly.[2]

In the first place, each stockholder of the Great Northern and Northern Pacific Railways who has disposed of stock to the Company has parted with his property absolutely. The disposition of stock is real, not colorable. The shares cannot be recalled by their vendors. They have passed into the Company's treasury: They are the mass of its assets. In the second place, it is not true that the disposing stockholder has received back under a new title the property he transferred. If he has sold, say, 1,000 shares of Great Northern, he does not receive them back in the guise of Northern Securities stock. Each share of Company stock represents a proportion of all the stocks of both railroads lying in the Company's treasury. Formerly a stockholder in a single railroad, he is now mediately a stockholder in two because of his interest in the Company.

Even if the charge were true, it would not be material in this suit: It might suggest an invasion of the rights of minority stockholders in the railway corporations, but private interests are not involved. It might suggest a misuser of New Jersey's corporation law, but this would be a matter for New Jersey to investigate, for while the Supreme Court has declined to recognize a State corporation on the ground that it was organized for the purpose of perpetrating a fraud upon a Federal Court,[3] the principle of this decision is not applicable to the Securities Company. It might indicate the employment of devious

[1] (1890) 121 N. Y., 582, cited *infra*, S. 58; Uncles *v.* Colgate, (1896) 148 N. Y., 532. [2] (1895), 160 U. S., 327.

[3] Lehigh Co. *v.* Kelly (1895) 160 U. S., 327.

methods, but it will be shown that this is not a material factor in the definition of liability in the case at bar.[1]

9. In considering the actions of the individual defendants from a legal standpoint we must bear in mind that the Act of 1890 has been so construed as to prevent the parties to any contract or combination in restraint of competition from escaping condemnation by showing that in fact there is no harmful "restraint of trade."

Whether this construction, approved by a bare majority of the Supreme Court, but thrice approved,[2] should be attacked again in the hope of a change in opinion, may be a question for the consideration of counsel. This rigid construction was severely criticised by dissenting Justices; it seems to have surprised at least one of the framers of the Act;[3] but probably the Court will adhere to it.

Accepting this construction as settled law it must be insisted, however, that where there is so sweeping a definition of liability in respect of the consequences of an action there is an obligation to define the action itself with peculiar

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[1] See S. 17.

[2] U. S. *v.* Joint Traffic Association (1898) 171 U. S. 574.

[3] Senator Hoar, who was a member of the Judiciary Committee that reported the Act of 1890, said in the Senate on January 6, 1903:

"We undertook by law to clothe the Courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase, 'in restraint of trade,' had a technical and well understood meaning in the law. It was not thought that it included every restraint of trade, whether healthy or injurious.

"We were disappointed in one particular. The Court by one majority, and against the very earnest and emphatic dissent of some of its great lawyers, declined to give a technical meaning to the phrase, 'in restraint of trade,' and held in one important case that if trade were restrained by an agreement it was no matter whether it were injuriously restrained or no.

"We did not put into our bill the words, 'unlawfully and improperly restrained,' because we were afraid it would be objected that we were giving the Court a legislative power to declare what was improper. We supposed the Court would interpret the law, and that these things which had been by the established and recognized law held to be contrary to public policy, like oppressive agreements, agreements clearly wicked, though not prohibited by existing law, agreements which were to destroy the purposes for which the aggregate powers had been created, would be held to be within in its prohibition."

strictness. This strict definition the Court suggests in saying:

"An agreement in the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade."[1]

"We think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution; and that the power to regulate commerce comprises the right to enact a law *prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States.* We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes, or was intended to include a right to make a contract *which, in fact, restrained and regulated interstate commerce,* notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts."[2]

The decisions of the Court in the Trans-Missouri and Traffic Association cases provoked strong dissents, but, at least, there was in each, and also in the Addyston case, an agreement dealing specifically with rates and prices affecting interstate commerce, and upon these agreements the Court based its conclusions. There is no such agreement in the present case, or anything like it. The relation of the acts of these individuals to interstate commerce is comparatively remote and circuitous.

10. The truth is that the Government in pressing the charge of conspiracy interpolates in the Act of 1890 a Federal power not hitherto claimed. In previous cases the Act has been construed to limit the freedom of contract to a certain extent. The Government now insists upon a construction that would limit the freedom of disposition of property; a more serious intervention with personal liberty than any limitation on the freedom of contract heretofore sustained.

The fact that the property has been disposed of to a corporation created by the vendors is not material. This is not, in itself, an illegal or an uncommon transaction. The Act does not pretend to forbid it in terms, and it must be insisted that the power to regulate commerce cannot be

[1] U. S. *v.* Joint Traffic Association, (1898) 171 U. S. 577.

[2] Addyston Co. *v.* U. S. (1899) 175 U. S. 229. The italics are mine.

exerted to prevent an owner of stock in a State corporation from disposing of it at pleasure. Generally speaking, a restraint on alienation can only be imposed by the law of the place of incorporation; and it will appear that none is imposed by the charters of the Great Northern, and the Northern Pacific Railways.[1]

Reviewing the acts of the individual defendants, it does not appear that the organization of the Company and the sale of stock to it amount to a contract, combination or conspiracy, by which competition between the Great Northern, and Northern Pacific Railways has been "directly and effectually stifled" within the purview of the Act of 1890, as defined by the Supreme Court.

The Charge of Monopoly.

11. It may be contended that I have discussed the charge against the individual defendants without giving due weight to the position of the Securities Company, which the petition depicts as the creature of a conspiracy and the instrument for furthering its designs. Such an objection would be ill-founded. Should several persons be prosecuted for conspiracy, the fact that they had associated themselves in a corporation in order to promote their ends would not relieve them from punishment if the ends were unlawful; indeed, it might be evidence of that joint action which is essential to conspiracy. But where, as here, the Government endeavors to terminate a condition by civil process, not to punish any one, its efforts are wholly directed against the party who is actually responsible for maintaining the condition. Now if these individual defendants, instead of organizing the Company, had sought to accomplish their purposes by entering into some arrangement to be carried out by themselves or their servants, they would be immediately responsible for the state of affairs that has provoked this suit. They would then be the important defendants, whose acts, if unlawful, would denote a conspiracy. But in organizing the Securities Company they presented a new person well known to the law—an independent, capable and responsible corporation.

[1] See S. 58.

If I touched lightly upon the Company in considering the charge of conspiracy, it was that I might better emphasize now its consequence as the one defendant whose position and powers are of vital interest in this suit. The Company is the chief defendant; such others as are properly joined are impleaded in obedience to familiar principles of equitable jurisdiction. If there be any unlawful interference with commerce the Company is immediately and sufficiently responsible. Any responsibility on the part of its organizers and stockholders is relatively remote and trifling. The commanding position of the Company is recognized in the main prayer of the petition, that it be ordered to return the stock it has acquired—returning the stock would dissolve the whole transaction.

The Government charges monopoly as well as conspiracy, and only when we have brushed aside the conspiracy charge do we face the real question—whether the Company violates the second section of the Act, which begins:

"Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

12. The Northern Securities Company was organized in the State of New Jersey, under the General Corporation Law of 1896.

The purposes of the Company are thus set forth in its charter filed November 13, 1901:

(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of

any other State, Territory or country, and, while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds, or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four hundred million dollars ($400,000,000), divided into four million (4,000,000) shares of the par value of one hundred dollars ($100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

13. The legislature of New Jersey creates the Company and confers all its powers, and so the charter, while actually framed by the corporators themselves, is supposed to be, in theory of law, the very act of the legislature so far as it conforms to the true intendment of the enabling statute, and a valid act of the legislature so far as the enabling statute is in itself a constitutional expression of power. Furthermore the actions of the Company, performed in the exercise of its powers, are as truly within the legislative scheme of incorporation as though they had been specifically authorized.

Reading the charter in the light of the Company's action it is to be construed as though the legislature of New Jersey had authorized the Company to do precisely what it has done under claim of implied power—that is to say, to acquire a majority of the stock of the Great Northern, and the Northern Pacific Railway Companies. The fact that these railways lie beyond the territory of New Jersey is deemed important by a State that is now suing the Company;[1] but the Federal Government takes no account of this. It is trying to enforce a statute of national scope, and the relation of the Company to this law would not be dif-

[1] See S. 43.

ferent had it chosen to acquire stock of competing interstate railroads running through New Jersey.

14. Primarily, the Company is an investment corporation. It is organized to do what any member of its stockholding body could do of his own motion, namely, acquire stocks to the extent of its ability—the ability of the individual being measured by the resources he happens to command, and that of the corporation, say, by its authorized capital of $400,000,000.

Both the petition and the answers call it a "holding" company. This description is not inaccurate, though perhaps "owning" company would be more exact, yet the Company is not a passive corporation, not a mere conduit for the transmission of dividends on Great Northern, and Northern Pacific stocks to its own shareholders. In virtue of its holdings the Company is necessarily interested in railroading, yet it is not a "railway corporation" in any sense that would strengthen either the attack or the defense in any pending suit. Suffice to say, at present, it is an active business corporation intent to administer its property for profit.

15. Upon obtaining its charter the Company began to do business.

What is its business? Acquiring, holding and administering property, especially Great Northern, and Northern Pacific stocks. How does it administer its property? Just as any other majority stockholder might lawfully do. Where does it do business? There seems to be an impression that a frank answer to this question must convict the Company of questionable, if not illegal, practices since its home is in New Jersey, its important office is in New York, and every mile of railroad which ultimately gives value to its stock lies in distant States. Because of these facts the Company has been called a "tramp" corporation, but this epithet carries no fair suggestion of irregularity, for the condition it caricatures is sanctioned both by international and national usage.

Among the earliest business corporations formed in England were the Russia, the Levant and the East India Companies, all chartered to trade abroad, and the practice has developed with the growth of international intercourse.

The Panama Railroad which was incorporated in New York, and the Panama Canal which the United States are trying to buy from a French corporation, are types of a great number of companies created in one country to do business in another.

In the United States a group of men wishing to organize a corporation have a right to avail themselves of the general corporation laws of any State to which they conform, provided the purpose does not require the home of the company and the field of its operations to be the same State. The fact that the corporation does little business in its legal home, and that perhaps chiefly of a routine nature, does not necessarily concern the incorporating State. But the corporation can do no business in another State without a license,[1] and this imperative condition relieves it from any suggestion of irregular activity abroad. It cannot go where it is not permitted.

So free are persons to seek favorable corporation laws, so indifferent are some of our States to the *personnel* of incorporators, that it has been held that when citizens of one State go to another, and there organize a corporation whose principal business is to be done in the former State, this State will admit the corporation,[2] even though it was expressly chartered for the purpose of acquiring and managing real estate therein.[3]

16. Corporations of extended activities and interests are, of course, more complex in operation than corporations of narrow range, and more difficult to regulate, but their status, duties and rights are quite as plainly defined as those of the numberless individuals and unincorporated associations trading at large, and more plainly than those of migratory individuals whose contracts, marriages and deaths provoke so many vexatious questions of private international law. The supervision of companies doing business away from home is not free from embarrassment, and their rapid multiplication may warrant legislatures in revising somewhat the rules for their governance, but unless their origin is

[1] See S. 38.

[2] Demarest *v.* Flack (1891) 128 N. Y. 205. See also Oakdale Man'f'g Co. *v.* Garst (1894) 18 R. I. 484.

[3] Lancaster *v.* Amsterdam Improvement Co. (1894) 140 N. Y. 576.

questionable [1] it is too late in the day to challenge their regularity.

Contrasting the Securities Company with corporations actually administering undertakings entirely outside the State of incorporation, its position appears to be comparatively simple, since its business is that of a stockholder managing its investments.

The Federal Government would not have interposed had the Company acquired stocks to any amount in any number of corporations not engaged in interstate commerce. In fact it acquired stocks in interstate railways. Still the Government would not have interposed had it acquired minority interests in competing lines, or majority interests in connecting or unrelated lines. Such operations would have been viewed with indifference, as the acts of a company whose investments were not of Federal concern. But the Company acquired majority interests in the Great Northern and Northern Pacific Railways which, as we shall see, are in a position to compete for a part of interstate traffic, and this transaction has provoked the present suit.

17. The Government impugns the motives and the methods of the transaction, and the defendants reply. Much of the evidence on both sides touching these matters seems to be immaterial. Such evidence always tends to obscure the issue, in this case rather to the disadvantage of the defendants, for if there be any advantage of position here it is with the Government, which, backed by a strong popular sentiment, summons them before a tribunal which has already enforced the Act of 1890 against the Trans-Missouri and the Joint Traffic Associations.

In these circumstances the defendants are pressed to differentiate the Securities Company from the Associations so radically as to demonstrate its exclusion from the purview of the Act. Of what value to this demonstration are the motives of the stockholders in selling to the company? Motives somewhat variant, except for a common note of pecuniary interest; eminently reasonable from the business standpoint, but quite ineffective in defending an action

[1] See Lehigh Co. *v.* Kelly (1895) 160 U. S. 327; Princess of Reuss *v* Bos (1871) L. R. 5 H. L. 176.

founded on a penal statute. Of what value a disclaimer of intention to raise transportation rates, since the Supreme Court has eliminated good intention as a factor in interpreting the Act of 1890? Of what value proof of economic benefit from the harmonizing of railways, since the Court has eliminated such proof as a factor?

The Supreme Court has made accomplishing a forbidden act a test of liability under the Act of 1890, and not intention, as perhaps might be inferred by collating some unimportant *dicta*.[1]

"If the agreement [in the Freight Association case] did not in fact restrain trade," said the Court, "the Government had no case."[2]

"It is useless for the defendants to say that they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement."[3]

By these statements the Court rejects both innocent and guilty intention as tests and interprets the Act in accordance with its plain terms.

There is but one fact of vital importance in this case—ownership by the Securities Company of controlling interests in the Great Northern, and the Northern Pacific Railways. There is but one leading question of law—whether this ownership creates a monopoly forbidden by the Act of 1890? The answer depends primarily upon the relation of the Company to commerce. This relation is not at all affected by the personality of its organizers and stockholders. Had the railroad stocks been sold to a corporation which had been organized by strangers to acquire them, or should a majority of Company shares be now held by strangers, this relation would be the same. Nor is it affected by motives and methods. Questionable motives and devious methods, though proved, would not invalidate a relation otherwise lawful. Nor, disproved, would one otherwise unlawful be legitimated. In fine, if there be a violation of the Act of 1890, it is due altogether to the ownership of stocks by the Company and its consequences. Its antecedents are irrelevant.

[1] See 166 U. S. 324, 342; 171 U. S. 501.

[2] U. S. *v.* Joint Traffic Association (1898) 171 U. S., 559-60.

[3] Addyston Pipe Co. *v.* U. S. (1899) 175 U. S. 243.

18. The Company, being an owner of property, intends to exercise the rights incidental to ownership, and its charter powers to administer and protect its possessions simply indicate these rights. Being an owner of stocks, it intends to exercise the rights enjoyed by stockholders generally, notably the right of voting for directors, and its holdings appear to be so distributed as to enable it to elect the boards of directors of the Great Northern and the Northern Pacific Railways.

The petition alleges that the Company, having the power to elect the directors of both systems, will find it its "*duty* to pursue a policy which would promote the interests, not of one system *at the expense of the other*, but of both *at the expense of the public*."[1] What right has the Government to insinuate that the public interest in competing railways is served when one of them prospers "at the expense of the other"? This not unusual result of competition, far from being desirable, marks the comparative inefficiency of that "other" system, and is therefore a detriment to the section of country dependent upon its facilities. Should either the Great Northern, or the Northern Pacific railways be operated "at the expense of the other," one section must suffer. And what right has the Government to assert that a corporation is impressed with a "duty" to violate its public obligations?

19. The Company will not introduce a novel condition in railway affairs in exercising the stockholder's right, for it is well known that two or more boards of directors are frequently elected by single interests. Such conditions, however named, however created, are generally founded upon the ability of stockholders to vote their shares at discretion. The present condition is distinguished chiefly because the power of election is vested in a regularly organized corporation. It presents the latest, and most striking method of obtaining results by no means novel in themselves. This open assumption by a single corporation of power to elect two railway directorates has doubtless provoked the present suit, but the fact that the power is exercised by one stockholder should constitute a sufficient defence.

[1] The italics are mine.

I shall not consider the bearing of a decision in the case at bar upon transactions somewhat like this in purpose, but differing in method. But I venture to doubt whether proof that other, even all other, great railway systems are substantially operated in harmonious groups would influence the Supreme Court to deny an injunction in this case.

Possibly a victory for the Government would lead to successful attacks upon railway and industrial arrangements hitherto deemed secure; but these are not before the Court, and therefore such a result cannot be taken for granted. "I entirely deny," said Lord Halsbury,[1] "that [a case] can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." This frank admission that case law is not invariably a chain of logical inferences is applicable to the body of decisions interpreting our law of Federal commerce. Emphatically this is not a "logical code." It deals with the most complex subject in all our Federal jurisprudence, and while the line of decisions yields some leading principles, it is, in great part, a series of adjustments evoked by peculiar exigencies.

20. The precise question in the case at bar is whether the control of two or more corporations engaged in interstate commerce by one stockholder amounts to a "monopoly" forbidden by the second section of the Act of 1890.

What commerce is the Company supposed to monopolize? The Act of 1890 relates to foreign, as well as to interstate commerce. The Great Northern, and Northern Pacific Railways are engaged in commerce of both kinds, and the Government charges monopoly in respect of each.

The bulk of the trans-Pacific commerce of the United States, wherever its particular shipments begin or end, is carried on by way of the domestic port of San Francisco or the ports on Puget Sound, or by the foreign port of Vancouver. No charge of monopoly should be entertained without surveying this commerce as a whole, and no survey will be complete that remarks only the competition of railways running to a single port, and ignores the competition between the ports themselves.

[1] Quinn *v.* Leatham, [1901] A. C. 508.

The Securities Company asserts that it is not monopolizing foreign commerce, but on the contrary that whatever influence it may exert upon this commerce is chiefly directed to the creation of a strong competitor for the trans-Pacific trade, especially for the trade from the foreign port of Vancouver, which is the terminus of the Canadian Pacific Railway. While the promotion of competition in foreign commerce would not, of course, gloss over a distinctly illegal monopoly of interstate trade resulting from the same transaction, it is, nevertheless, a material factor in determining the relation of the whole transaction to commerce.

Coming to interstate commerce, it appears that the Great Northern, and Northern Pacific Railways are by no means the only competitors for a large part of transcontinental traffic, and that in great sections of the territory served by them they lie too far apart to compete. But it also appears that they are in a position to compete for a portion of this commerce, and, as the Act forbids the monopolization of "any part," the Government will gain its suit if it shall prove the existence of an unlawful monopoly in this respect, unless, indeed, the competitive, is so trivial in comparison with the non-competitive traffic that the Supreme Court will be justified in disregarding it as a factor.

21. The Court has not defined a "monopoly" forbidden by the Act, the complaints sustained thus far having been decided with special reference to the first section. This definition is yet to be formulated, and in inquiring whether the Company falls within its proper terms we are entitled to assume at the outset that a forbidden monopoly will be defined as strictly as a contract in restraint of trade, which, as we have seen, is one that "directly and effectually stifles competition."

The Securities Company does not make rates, nor does it appoint the officials who make them. Rate making for each railroad is, in common with all other details of management, necessarily confided to officials who are appointed by separate directorates. When the Company, which simply elects these directorates, is contrasted with the associations which have been condemned because they actually imposed non-competitive rates, we see that its relation to actual rate making is comparatively remote.

There is a broad distinction between the corporation acting by its board of directors, and a person who happens to own a majority of the stock; and the legal immunity of the board from dictation by the stockholder is clearly pointed out by the Supreme Court in the following observations:

"The mere fact that Crawford owned a majority of the stock did not give him the legal control of the company; nor from such ownership can the legal inference be drawn that he dominated the board of directors."[1]

"The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corportion, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."[2]

Nevertheless, the Great Northern, and Northern Pacific Railways are ultimately controlled by one stockholder—the Securities Company, which is enabled to manage them in substantial harmony, and will be presumed to do so, inasmuch as its interests would be prejudiced by pitting one against the other. In fact, the Company seems to be a more potent agency for the harmonizing of railways than the Trans-Missouri, and the Joint Traffic Associations. For while these merely linked railways by loose and temporary conventions, the Company welds them by a strong and permanent bond. In these circumstances I am sure the

[1] Porter *v.* Pittsburg Bessemer Steel Co. (1886), 120 U. S., 670.

[2] Pullman Car Co. *v.* Missouri Pacific Co. (1885), 115 U. S., 597.

Court will find that the Company, as the chief proprietor of two railway systems, will bring about an *entente cordiale* in the matter of rate-making, though the rates will be actually imposed by officials of the respective lines.

In fine, the Great Northern, and the Northern Pacific are no longer to be classed among the competitive systems.

22. The principal defence of the Company to the charge of unlawful monopoly is based, however, upon a broader ground than non-participation in the actual work of rate making, upon a fundamental principle of law rather than an acute differentiation of facts.

We have seen that the Supreme Court has defined a contract in "restraint of trade" literally.[1] But no such sweeping definition of "monopoly" is to be apprehended, else every railroad corporation in the country would be indictable for operating its line; for, as the Court remarked in U. S. *v.* Freight Association:[2] "as to a majority of those living along its line each railroad is a monopoly." A monopoly of this sort, which means that a business "affected with a public interest" is carried on in a particular place by a single agency — "a virtual monopoly"—is not necessarily opposed to public policy; on the contrary, the State frequently charters it. In fact, the proprietors of some monopolies of this description, railroads for instance, may be compelled to operate them under threat of a receivership or, conceivably, of expropriation; and the proprietors of all of them, so long as they do business, can be compelled to serve all comers at reasonable rates. Since every monopoly is not forbidden by the Act we perceive that the definition is not literal, as in the case of contracts in restraint of trade, and, if not literal, the Court is free, nay, it is bound to exclude from the operation of the statute every act not in the category of the monopolies condemned by general principles of law.

23. The charge of monopoly is concisely preferred in the allegation that "a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems has been effected."

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[1] See S. 9. [2] (1896) 166 U. S. 334.

This is the master sentence of the petition.[1] The statement is substantially accurate. While there is no "consolidation" in the strict legal sense of the word, since each system preserves its name and its organization, exercises its own powers of management, and has no specific interest in the other, both are now controlled by a single corporate hand.

If there be an offence against the Act here is the head and front of it. Do the facts establish an unlawful condition? If so, the following proposition must be incorporated in our Federal law: Every person owning majority interests in two or more agencies of interstate or international commerce, which are in a position to compete in respect of any part of such commerce, maintains a monopoly forbidden by the Act.

In the public discussion of the Securities Company case it seems to be assumed that there is no Federal power to prohibit an individual from acquiring stock to any amount in any number of corporations, but at the same time there is a disposition to recognize a Federal power to prohibit a State corporation from doing this, and to perceive its exercise in the Act of 1890.

Can such a differentiation be maintained? Has Congress greater power over a corporation organized in a State than over a natural person therein? Now, a corporation created in one State is so far "foreign" to another that it can do business therein only by license, though a citizen of the State is entitled to admission.[2] The same rule applies to local corporations of the Territories and the District of

[1] In denouncing a "virtual" consolidation the Government evidently assumes that the formal consolidation of competing lines is forbidden by the Act of 1890; but this is begging a very important question. "Consolidation," "amalgamation," "merger," "purchase," "lease," are familiar terms in corporation law denoting the union, absorption or control of corporate bodies: They are employed in enabling, as well as disabling statutes, in respect of competing, as well as connecting lines; yet Congress did not add the few words that would have expressed an intention to condemn the conditions they indicate. The relation of the Act to consolidation, purchase, lease, etc., is an open question even in the Federal Territories, where Congress is supreme, and a very grave question in respect of corporations organized in States, where Federal authority is limited.

[2] See S. 38.

Columbia,[1] and to State corporations seeking admission to the Territories or the District.[2] But the relations between a State and the United States seem to preclude either sovereign from dealing with a corporation chartered by the other as "foreign" in any such discriminative sense, though when a Federal corporation does business in a State it may not be amiss to apply the term for some purposes of classification.[3] It must be understood that our New Jersey corporation is no more "foreign" to the United States than is a citizen of the State. Each is to the United States simply a "person" residing in one of the States.

To appreciate the true bearing of the above question we must look beyond the particular enterprise of the Securities Company and survey the widespread business interests managed by State corporations in general, among which the railroad business is prominent. In certain States the union of competing roads by consolidation or purchase or lease is not forbidden by the Constitution, and legislatures have authorized these things to be done upon the supposition that they were within the normal sphere of State authority, even though the roads were engaged in interstate commerce. Are these consolidations, leases and purchases made before the Act of July 2, 1890, legitimate only upon the theory that the States entered a province of interstate commerce not then pre-empted by Congress? Are those made since the Act illegal?

It is no answer to say that the Government could break a combination like the Joint Traffic Association even were it expressly authorized by a State, since a State cannot confer the right to fix the rates of interstate commerce. It is quite another thing to deny a State's capacity to create railway corporations, alter their structure, and readjust their relations, so long as the United States are free to regulate their conduct of interstate traffic. In this relation the following statements of the Supreme Court are of interest:

In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid

[1] See Hadley *v.* Freedman's Savings Co. (1874), 2 Tenn. Ch. 122.

[2] See Empire Co. *v.* Tombstone Co. (1900) 100 Fed. R. 910.

[3] See Commonwealth *v.* Texas & Pacific R. (1881) 98 Pa. St. 90.

interference therewith; while to the States remains the power to create and regulate the instruments of such commerce, as far as necessary to the conservation of the public interests.

If it be assumed that the States have no right to forbid the consolidation of competing lines because the whole subject is within the control of Congress, it should necessarily follow that Congress would have the power to authorize such consolidation in defiance of State legislation—a proposition which only needs to be stated to demonstrate its unsoundness.[1]

24. The assertion of a peculiar Federal power over the corporations of a State as distinguished from its citizens carries us beyond the matter of railroad transportation. We have seen that none of these corporations can do business in another State without license from the latter. Can the United States restrain a corporation from doing business outside of its State without a Federal license though a neighbor State is ready to admit it? Can they license the corporation in another State despite the State's opposition, upon the theory that the circumstances indicate one of those interstate commerce cases in which, when Congress acts, it is able to arrogate an exclusive jurisdiction? Now assuming that Congress is competent to charter interstate railroads,[2] and shall exercise the power by enacting a national railway law, a question of particular concern to railroads will arise, but if our general query be answered in favor of Federal power, we get the broad proposition that every corporation wishing to do business in another State may be compelled to obtain a Federal license, which once granted will override all objections from that State. As power to grant a license involves, generally speaking, the right to dictate conditions it is perceived that Congress could exercise a most searching control over all corporations doing business beyond the home State.

I make these observations by way of inquiry. That a governmental power is mighty, that it may be abused, are not reasons for denying its existence, else government would cease; yet when a power is newly claimed its novelty, and, we should add in this case, its contradiction of inveterate opinion, its subversion of habitual practice impose a heavy burden of proof upon those who would establish it.

[1] Louisville & Nashville R. *v.* Kentucky (1896) 161 U. S. 702.

[2] See S. 25.

With this caution we proceed to examine the law of the matter.

25. The probability that Congress might have no cause to subject individuals to the restraints which corporations might invite by reason of their greater potency has no bearing on the fundamental question of law—Whether the corporation is subject to a peculiar Federal control because it is an artificial being—and the answer must be sought in the Constitution.

It is said that when the Constitution was adopted there were but half a dozen business corporations in the whole country; two insurance companies, two banks, a bridge, and an iron company.[1] In these circumstances we are not surprised to learn that the Constitutional Convention showed little interest in corporations. Mr. Madison proposed that Congress be given "a power 'to grant charters of incorporation where the interest of the United States might require and the legislative provisions of individual States may be incompetent.' His primary object was, however, to secure an easy communication between the States which the free intercourse now to be opened seemed to call for. The political obstacles being removed, a removal of the natural ones as far as possible ought to follow." After a brief debate the proposition was rejected by a vote of eight States to three.[2]

Corporations are nowhere mentioned in the Constitution, and if Congress has a peculiar power over a State corporation it must be attributed by implication. Avoiding the "general welfare" clause which, once perverted from its normal meaning by what might be called "a viperous gloss which eats out the heart of the text"[3] will arm Congress to do pretty much everything from giving the freedmen the long awaited "forty acres and a mule" to seizing the coal fields, we consider the clause enabling Congress "to pass all laws which shall be necessary and proper for carrying into execution" the several legislative and executive powers conferred elsewhere.

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[1]See Law of Business Corporations before 1800, by Samuel Williston, 2 Harvard Law Review 165.

[2]Madison's Journal, State Department Ed. 744.

[3]Case of the Marshalsea, 10 Coke 70.

This clause authorizes Congress to incorporate banks as a means of executing the fiscal powers,[1] bridge companies in order to promote commerce between the States,[2] and, though it has never been necessary to weigh the question in a contested case, it is said that for this purpose Congress can incorporate railway[3] and telegraph companies.[4] But the suggestion of congressional power to incorporate Federal companies for the production of articles of interstate commerce within the States, or for interstate purposes generally, presents a question we need not here consider.

26. The ability of Congress to create Federal corporations, whatever its range, does not illuminate the question regarding a peculiar power over State corporations, but the commerce clause of the Constitution which supports some manifestations of this ability is also the only one which affords an excuse for raising it. I have insisted that the commercial power must be capable of a more strenuous exertion in respect of foreign than of domestic intercourse, in respect of the trade with strangers than of trade among ourselves,[5] and the Supreme Court should declare invalid any statute designed to hamper the "trusts" at the expense of that right of open commercial intercourse among the people of the States which so largely induced the adoption of the Constitution. I do not find, however, in the commerce clause itself a hint that Congress has greater control over one class of domestic persons than another, and so we must inquire whether elsewhere in the Constitution there is drawn an implied distinction between corporations and natural persons which can be properly read with the commerce clause.

The difference between a corporation and a citizen of a State which enables another State to exclude the former from doing business therein without license secures to a

[1] McCulloch *v.* Maryland (1819) 4 Wheat. 316.

[2] Stockton *v.* B. & N. Y. R. (1887) 32 Fed. R. 9; Luxton *v.* North River Bridge Co. (1893) 153 U. S. 525.

[3] See Union Pacific R. *v.* Hall (1875) 91 U. S. 351; California *v.* Pacific Railroad (1887) 127 U. S. 39; Luxton *v.* North River Bridge Co. (1893) 153 U. S. 525.

[4] See Pensacola Tel. Co. *v.* West. Union Tel. Co. (1877) 96 U. S. 1.

[5] See Federal Trust Legislation, Political Science Quarterly, Dec. 1897, 638-40; and The Law and Policy of Annexation p. 94).

State a larger power over corporations than individuals, but the principle of this rule should not be perverted so as to give Congress less control over individuals than corporations in the regulation of interstate commerce. This would be the legal consequence of maintaining the peculiar Federal power over corporations that is suggested, for the assertion of a larger authority over one class implies less authority over another—a result quite incompatible with the comprehensive power of Congress. "Commerce," says the Supreme Court, "is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is *State legislation or private contracts between individuals or corporations*, should be subject to the power of Congress in the regulation of that commerce."[1] A State, a State corporation, and a State citizen are equally bound to respect the Federal authority over commerce which bears, potentially, upon all alike. This authority is conferred over a thing—commerce. It warrants whatever legislation can be said to "regulate" this thing within the meaning of the Constitution. For example, whatever rules in respect of "publicity" Congress can lawfully impose upon State companies engaged in interstate commerce are not expressive of a visitatorial power over corporations. They are manifestations of the regulating power to which, if it please, Congress can subject the petty trader.

I conclude that the Federal Government has no special jurisdiction over a State corporation because it is an artificial, and not a natural, person, except in the event of its seeking to do business in Federal Territory when it seems that the Government, like any State, may treat it as a "foreign" corporation. In other respects, the peculiar power of regulating these artificial beings is vested in the States that create and license them. A corporation of New Jersey is subject to no greater Federal control than a private citizen of the State. And it will now be shown Congress did not even attempt to assert a peculiar jurisdiction over corporations in enacting the statute of 1890.

27. Congress has not pretended to single out corporations in the Act of 1890. This Act condemns "every per-

[1] Addyston Pipe Co. *v.* U. S. (1899) 175 U. S, 230. The italics are mine.

son " who by himself, or in conjunction with other persons, shall unlawfully monopolize commerce. If the holding of majority interests in competing interstate railways is an offence it is so by virtue of the holding itself and its consequences—the personality of the holder is immaterial.[1] If the Securities Company of New Jersey offends by reason of its control of great railways, an individual in New Jersey acquiring smaller ones must be equally in fault. He cannot plead that he is not a monopolist because he is not a corporation.

The agencies of interstate commerce covered by the proposition are not railroads alone; nor need the agencies be similar—the single ownership of a competing railroad and ferry, or a toll bridge and ferry would be unlawful. The agencies in question may not be confined to works of transportation. They may be found to include industrial works transacting an interstate business within the meaning of the opinion in the Addyston case.

28. If the proposition suggested in Section 22 is sound, then every person purchasing and holding majority interests in any two concerns which are in a position to compete for any part of interstate commerce is guilty of a misdemeanor. If this be the law, Congress can abridge a man's ability to go into the market and acquire whatever property he fancies, in such amounts as his resources permit.

The freedom of a natural person to acquire property is so generally assumed that, had Mr. X. applied the enormous fortune he is supposed to possess to the purchase of controlling interests in the Great Northern, and Northern Pacific Railways, I think the legality of his action would be conceded, though his investment would afford a more striking demonstration of the power of concentrated capital than the action of the Securities Company exhibits. Yet, in truth, Mr. X. and the Company, the natural and the artificial person, stand in the same position before the Federal power over commerce expressed in the Act. In acquiring property each acts in accordance with the law of its being, and it cannot be maintained that Congress is at once bound to respect the general principles of law under which the individual acts, and at liberty to override

[1] (See S. 16.)

the special application of these principles in the New Jersey charter under which the Company acts.

We may not take it for granted that Mr. X. is beyond the reach of the Act of 1890. We must consider whether Congress desired, whether, indeed, the power to regulate commerce gives it a right to restrain the ability of a citizen or a corporation of a State to acquire property.

29. When a legislature proclaims a new offense against the state its action is supposed to indicate that a new mischief has arisen, or that an old one has become intolerable. In either case, a court should interpret the statute with due appreciation of the conditions which induced its passage.

When the Government, irritated by new developments of the power of capital, tries to restrain them by proceedings under the Act of 1890, it is not for the Supreme Court to decide that Congress was indifferent to method, where its decision would abridge privileges which at the passage of the Act were not exercised on so large a scale as to warrant the presumption that the legislature wished to qualify them. These principles of interpretation are applicable to the case at bar.

It has long been realized that combinations of persons may work harm, and limitations on the freedom of contract in this direction have been imposed by legislatures, and have been sustained by courts as constitutional expressions of power. It has long been realized also that concentration of vast wealth in a single hand may be harmful, but our legislation has not yet set bounds to the amount of money a natural person may accumulate during his life, or to the quantity of marketable property he may buy; and this abstention seems to be enforced by constitutional prohibition. The difference between forbidding a man to do as he pleases with his own, and forbidding him to make marketable property his own which he can gain by means not essentially immoral, appears to be well recognized in our jurisprudence; certainly it is not obliterated in the grant of Federal power to regulate commerce.

30. The acquisitive powers of the artificial person—the corporation—are, of course, defined by its charter, but it is free within its limits, and, in construing the Act of 1890, the chartered freedom of a corporation organized under a State

law is entitled to equal consideration with the freedom of the individual.

"It was in the light of well settled principles that the Act of July 2, 1890, was framed," said the Supreme Court, "Congress did not attempt thereby to assert the power to deal directly with monopoly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of property: * * * or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."[1]

The Act of 1890 was induced by the prevalence of combinations of divers sorts between parties engaged in interstate commerce, and in condemning them Congress acted upon more or less familiar lines. The present suit is induced by a condition which at the passage of the act was relatively inconspicuous—the control of groups of corporations by single corporations. Probably the "virtual consolidation" of interstate railways in a "holding" company may be traced to the decisions of the Supreme Court condemning their association. Perhaps the new agency may be deemed more powerful than the old. But whether the last state be better or worse, economically, than the first, it is produced under the great right of free acquisition. This right cannot be abridged by Congress acting under the power to "regulate" commerce, or any other Federal power.

31. One charged with violating a penal statute is not driven to prove that actions other than his own are condemned in order to clear his skirts. The remark of the Supreme Court in U. S. *v.* Trans-Missouri Freight Association[2] that unless the charges were sustained there would be little left for the Act of 1890 to take effect upon, does not suggest a commendable rule for imposing the restrictions of a penal law. Statutes are sometimes futile. It seems hardly fair to punish a man in order to attribute intelligence to a legislature. At any rate, since the Act of 1890 has been thrice enforced by the Supreme Court, it need not be enforced in the case at bar in order to be relieved from the reproach of futility.

The defence to the charge may be materially strengthened, however, by showing the true application of the

[1] U. S. *v.* E. C. Knight Co. (1894), 156 U. S., 16.

[2] (1896) 166 U. S. 313.

statute, and so we inquire what Congress meant in condemning "monopoly" in the second section of the Act of 1890. It meant in the first place the monopoly that results from a contract, combination or conspiracy in restraint of trade. This is, of course, merely the consequence of actions already condemned in the first section. In the second place, Congress condemned the "virtual monopoly" which shall actually abuse its powers. This is the independent purpose of the second section, and if the Northern Securities Company, or any person whatsoever shall offend in this respect, the section warrants a prosecution.

The Company cannot pretend to claim that its actions are uncontrollable by law, but it is entitled to assert that its ownership of stocks is not condemned by the Act of 1890.

CARMAN F. RANDOLPH.

(*Continued in April number.*)